

October 30, 2006

**Utah Attorney General's Opinion No. 06-002**

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*Re: Authority of Local Health Departments to Charge Fees for Mandatory Inspections*

Director Sundwall:

This constitutes a formal Attorney General opinion in response to your query regarding the authority of local health departments (LHDs) to assess fees to school districts for making state-required inspections of school food service facilities. The Office of the Attorney General issued an opinion on this matter in 1999, opining that LHDs lacked authority to assess fees for required inspections. Subsequently in 2002, the state legislature amended Utah Code Ann. § 26A-1-114, renewing uncertainty about whether LHDs may assess fees. Thus, the essence of your query is whether the current version of § 26A-1-114 authorizes LHDs to assess fees for required inspections of school food service facilities.

Factual Background

The Local Health Department Act requires the governing body of each county to create its own LHD or to join another county or counties in the creation of a multicounty LHD. (Utah Code Ann. §§ 26A-1-103 and 105.) These LHDs are responsible for enforcing state health laws, Department of Health rules and regulations, Department of Environmental Quality rules and regulations, and their own regulations and standards.

The issue of LHD's charging for school inspections was addressed in 1999 by Assistant Attorney General John McAllister, who concluded that LHDs were required to inspect school food service facilities, but they were not authorized to charge a fee because the inspections constituted a mandatory duty. His conclusion was based on the 1999 version of § 26A-1-114 and on *Utah Restaurant Ass'n v. Salt Lake City/County Board of Health*, 771 P.2d 671 (Utah App. 1989), which held that LHDs have no independent authority to charge fees, and that "any such authority must be conferred on it by the county which created it, acting within its lawful authority, or by the legislature." *Id.* at 675.

Applying *Utah Restaurant Ass'n*, AAG McAllister concluded that the legislature had granted LHDs authority to establish fees in connection with their discretionary duties only, such as inspecting private food service establishments. The legislature had not, however, authorized LHDs to charge fees in connection with their mandatory duties, such as the School Health Inspection Program, because state funds were allocated on a population basis to LHDs to cover the costs of those programs.

Current Analysis

In its 2002 session, the Utah State Legislature enacted significant amendments to Title 26A, the Local Health Department Act. The amendments do not change the duty regarding inspections. Local health departments continue to be responsible for promoting and monitoring health conditions at schools within each county and to "make regular inspections of the health-related condition of all school buildings and premises." Utah Code Ann. § 26A-1-114(3)(c)(i). Although the statute makes no explicit mention of school food service facilities, it is reasonable, as AAG

McAllister concluded in his 1999 opinion, that food service inspections fall within the purview of the statute. Thus, LHDs continue to have a mandatory duty to make regular inspections of school food service facilities.

The amendments do, however, make changes, or at least clarifications, regarding the charging of fees. The current version of Utah Code Ann. § 26A-1-114(1)(h)(i) provides:

- (1) A local health department may:
- (h) pursuant to county ordinance or interlocal agreement:
- (i) establish and collect appropriate fees for the performance of services and operation of authorized or required programs and duties; (new language underlined)

Because school food service inspections are a “required program,” the statute permits LHDs to charge a fee for the performance of this duty. It must be noted, however, that § 26A-1-114(1)(h)(i) does not grant LHDs independent authority to charge fees. Rather, consistent with the court’s ruling in Utah Restaurant Ass’n., it creates lawful authority whereby individual counties or multicounty units may authorize LHDs to establish and collect fees for the performance of their duties.

#### Conclusion

It is our opinion that LHDs may charge fees for school food service inspections under one of two conditions: (1) Single county LHDs may assess fees if their sponsoring counties authorize them to do so by ordinance. (2) Multicounty LHDs may assess fees if the counties comprising their LHD reach an “interlocal agreement” authorizing the imposition of inspection fees.

Sincerely,

Mark L. Shurtleff  
Utah Attorney General